UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21784

CHARLES JOSEPH BATTAGLIA, JR.,

Appellant,

- against -

UNITED STATES OF AMERICA,

Appellee.

Appeal From The United States District Court For

The District of Arizona

BRIEF FOR APPELLANT BATTAGLIA

Albert J. Krieger
401 Broadway
New York, N.Y. 10013

Robert Kasanof
52 Broadway
New York, N.Y. 10004

Attorneys for Appellant
Battaglia

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Appeal from the United States District Court
for the District of Arizona

BRIEF FOR APPELLANT BATTAGLIA

This is an appeal by the appellant Battaglia from a judgment convicting him of interfering with interstate commerce by threats or violence in violation of § 1951 of Title 18, United States Code (Hon. WILLIAM N. GOODWIN, sitting without a jury) and sentencing him on February 17, 1967, to ten years imprisonment and a committed fine of ten thousand dollars.

I.

JURISDICTION

The jurisdiction of the District Court was based upon § 1951 of Title 18 of the United States Code and the indictment filed herein.

§ 1951 of Title 18 provides:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section---

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45. June 25, 1948, c.645, 62 Stat. 793.

The indictment charged Battaglia, along with one Spinelli and one Estes, with interfering with interstate commerce by threats or violence. The trial of Spinelli and Estes was severed and resulted in a judgment of acquittal (Docket Entries December 9, 1965, C.T. 99*). Its formal recitations apart, the indictment alleged that Battaglia and Spinelli operated the Tucson Vending and Amusement Company and that on or about December 30, 1963, the defendants by use of force obtained "space" for a coin-operated pool table device and a share of the profits from that device by the use of threats against one Jerome C. Greenwell, the operator of the Diamond Pin Lanes Bowling Alley in Tucson. By way of its bill of particulars (C.T. 22) the government made it abundantly clear that its case turned upon a single coin-operated pool table about which we defer discussion until our treatment of the facts.

---

* "C.T." refers to Clerk's transcript; "R.T." refers to the reporter's stenographic transcript of the trial which is in two volumes and covers the proceedings of January 11th, 19th and 20th, and is numbered consecutively; "R.H." refers to the reporter's transcript of the hearing on the defendant's motion to suppress in connection with the electronic eavesdropping. These proceedings took place on January 16th and 18th.

II.

STATEMENT OF THE CASE

A. Questions Involved

There are three basic questions which were presented for resolution to the District Court.

The first was: Was there an interference with interstate commerce? Only a single pool table was involved in the government's proof of its case and as we shall demonstrate in our treatment of facts, the pool table which was replaced by the pool table from the Tucson Vending and Amusement Company with which the appellant was associated had long since come to rest and lost its interstate character, nor was the replacement drawn from interstate commerce. If what transpired here burdened interstate commerce, then every commercial transaction, every purchase, every barter, no matter how local its source or consequence, has an interstate character.

The second question presented under the single substantive count of the indictment was whether Mr. and Mrs. Greenwell were in fact placed in fear. The ineluctable conclusion from the record is that they were not, and it is indicative of the strength of the government's case that Greenwell's own description under oath at the trial was:

"Q. And as you were walking around the building, were you in fear?

A. I have never feared Mr. Battaglia personally." (R.T. 123)

Mr. Greenwell's "fear" for his wife's safety was so great that at the time she was supposedly taking a circuitous route to and from the bowling alley she was permitted to go to the dog track and out dancing, unescorted by her husband. (R.T. 222-226)

The third question was whether the prosecution was tainted by the government's continuous and egregious "bugging" with trespass electronic devices of the defendant, his home, his place of business and places where he visited. This question breaks down into two subsidiary questions: First, was the electronic surveillance so great on the demonstrated record that the conviction should not be allowed to stand because the defendant's fundamental rights, including the right to counsel, were interfered with, and the conclusion is inescapable that the government's case was derived from the bugging; and second, whether the District Court so severely limited defense counsel's effort to develop the facts concerning the government's widespread and pervasive use of eavesdropping that the hearing

amounted to little more than the government's assertion that its case was untainted by the eavesdropping, and this is true despite the fact that some of the testimony at the hearing from police agents of the Federal government would do justice to a Baron Munchausen.

B. The Proceedings in the District Court

1. The trial on the Merits

The government's case stood or fell on the testimony of Jerome Greenwell, the bowling alley operator, who was the supposed victim of the extortion, and to a much lesser extent on the testimony of his wife. Their testimony was sandwiched between witnesses whose evidence was either cumulative, directed toward matters not in genuine dispute, or irrelevant, and we accordingly summarize this secondary testimony but briefly

The government's first two witnesses, REEVES (R.T. 37-43) and EDMISTON (R.T. 43-47), worked in a Tucson garage. Reeves testified that in 1963 he had seen Battaglia and the acquitted co-defendants Spinelli and Estes each driving cars which were serviced under the account of Tucson Vending. Edmiston's testimony was to a like effect, except that he was permitted to testify over objection that he had seen Battaglia, Estes and Spinelli together in 1964, after the date

of the acts charged in the indictment. HUGH DOWNS (R.T. 47-55), a bowling alley and theatre manager, and DON THOMPSON (R.T. 55-60), a cocktail lounge operator, each testified that at about the period of the indictment Battaglia had spoken to them about vending machines and identified himself as being with Tucson Vending Company.

IDA CHAPMAN (R.T. 60-82), in June of 1963 had been manager of the Diamond Pin Lanes which at that time had been purchased by Mr. Greenwell. The lane used supplies principally from the Brunswick Company in Los Angeles (R.T. 61-62). About a month after some pinball and amusement machines from Tucson Vending were installed at the lane they were serviced by Spinelli; she had a conversation with the defendant Battaglia shortly thereafter about his bringing more machines and Battaglia said that he could get them the business of a bowling league and to that end a meeting with Greenwell and a representative of the league was set up at which the league signed up for the Diamond Pin Lanes (R.T. 65-68). In the late summer or early fall she was present at a conversation between the defendant Battaglia and Greenwell at which Battaglia asked to put in candy vending machines and subsequently the candy vending machines of Tucson Vending were installed (R.T. 68-70). In the latter part of 1963 a coin-operated pool table was installed

in the game room of the bowling alley after one had been placed in the bar, and subsequently the felt on the one in the game room was slashed (R.T. 77-78).

JEROME C. GREENWELL (R.T. 82-215), the government's principal witness, had in various times and in various places recounted to the authorities widely differing versions of his dealings with the defendant Battaglia and the extortion supposedly worked against him by Battaglia. We first set out the version which he told at trial and which dovetailed into the government's indictment and bill of particulars.

During the period from 1958 to 1966 Greenwell engaged in various self-employment ventures including fashion design woodcraft and had owned apartment buildings and in June of 1963 had purchased the Diamond Pin Lanes, a bowling alley which contained a cocktail lounge and a beauty parlor run under the name of Diamond Pin Enterprises by a Jack Gumbin and Hoyt Wells. He first met the defendant Battaglia in 1958 and was introduced to him by one Louis Serotta (R.T. 82-84). After he became the owner of Diamond Pin Lanes he talked with Battaglia, who pointed out that pinball machines could be installed in the concourse with fifty per cent of the profit going to Diamond Pin and fifty to Tucson Vending, and two pinball machines were installed and proved quite profitable and he contacted Battaglia in July

about installing more machines, and in the course of that conversation Battaglia expressed a desire to put in candy and cigarette vending machines. However the vending machines of the Canteen Corporation were already on the premises. (R.T. 84-88). Greenwell agreed that if Battaglia would use his influence to get a new bowling league into Diamond Pin Lanes and Battaglia would indemnify Diamond Pin against any loss from their contract with Canteen---Battaglia had offered to advance the monies due Canteen---he would permit Tucson Vending's candy and cigarette machines in. (R.T. 88-92). At this period Greenwell declined to sign a written contract with Tucson Vending until the situation with Canteen had been resolved. (R.T. 92-93)

Sometime thereafter Hoyt Wells, the manager of the sub-lease cocktail lounge, asked permission to install a coin-operated pool table, which was done in September of 1963. Gumbin, Wells' partner, spoke to Greenwell about how profitable the machine was and they agreed to put one like the one in the cocktail lounge in the bowling alley itself, and this was done early in January 1964. A few days thereafter Battaglia appeared at the bowling alley quite disturbed, and a "heated argument" (R.T. 97) ensued in which Battaglia asserted that any pool table in the bowling alley should have been installed by Tucson Vending according to their understanding. Battaglia

referred to what had happened to Serotta, whom Greenwell understood from newspaper reports had been found murdered in the trunk of his car, and made ominous allusions to Greenwell's attractive wife. Then, in Greenwell's own words:

> "A. Well, we eventually simmered down, both of us, and then we got on a more intelligent conversation, I mean to where we weren't--- temper wasn't all the basis.
>
> Q. (By Mr. Corey) Now, did you do anything regarding the pool tables as a result of this conversation?
>
> A. Well, we did get down to the point to where I agreed to---I think Mr. Battaglia then proposed contacting Mr. Gumbin and see what he wanted for his pool table because I subsequently agreed to see what I could do about getting the pool table. I think he offered, if I recall correctly, that he offered to buy the pool table from Mr. Gumbin and go along with us on the same basis." (R.T.99)

But Gumbin would not agree. Subsequently the bowling alley pool table felt was slashed and Greenwell called Tucson Vending and accused Spinelli of the slashing, and Battaglia

told him that a bowling ball dropped through the pool table top would be worse. After that conversation Greenwell contacted Gumbin, had the table removed and it was replaced with another table from Tucson Vending. As a result of what Mr. Battaglia said, Greenwell was in fear, or so he testified. (R.T. 92-102)

Thereafter a lawsuit ensued with Canteen and a Tucson Vending check for $400 was paid over to Canteen. (R.T. 103-107) After the heated argument with Battaglia, Greenwell, because of Battaglia's having mentioned that he knew the route his wife took home, instructed her to take a better traveled road, without telling her the reason. After several weeks they quarreled about this and he told her of the conversation with Battaglia. A day or two later, in response to her telephone call, he met her and she was with a city detective who reviewed the situation with him, apparently from what his wife had already told the detective. (R.T. 102-108)

At the outset of his cross examination Greenwell made two extremely important concessions: first, that his memory was faulty, and second, that his prior statements were more accurate than his present recollection. Thus:

> "A. No, I'll be truthful about this, right at this moment I don't recall the approximate time they spoke with me.

Q. Are you troubled with a faulty memory?

A. I guess I have a faulty memory.

Q. You do have a faulty memory?

A. Because, to be honest about this, I have tried to forget this, just forget this.

Q. So that would account for your having difficulty with your memory today?

A. That's right.

Q. Of course, when these events were fresh in your mind, by time, you could remember them a lot more clearly, couldn't you?

A. I'd say rather accurately at the time that all this thing happened, but right at the present time I couldn't recall.

Q. This is the year January, 1967--- month of January, year of 1967. If you had testified before a United States Grand Jury in January of 1965, two years ago, your recollection as to events of January 1964, would be much more accurate than your recollection now; isn't that so?

A. On minute details, yes.

Q. And also about the substance of the transaction in general, about the entire happening?

A. I have to admit that. I'm only human.

Q. We all are.

A. Yes." (R.T. 112-113)

Before turning to some of those earlier statements, Greenwell's testimony about his fear bears some examination. In the conversation with Battaglia after the installation of the pool table, Greenwell testified that they were both angry and that he gave as well as got, but it was only after the mention of Serotta and his wife that he became afraid. Thus:

"Q. Well, the two of you had been shouting back and forth to each other; am I right?

A. Yes.

Q. Shouting stops?

A. Shouting what?

Q. The shouting stops?

A. Yes, it subsided.

Q. And while you are still in the presence of the defendant Battaglia, you are not afraid; right? Yes or no.

A. Yes." (R.T. 120)

At this point the Trial Judge helpfully intervened to remind counsel that the local rule in Arizona required the cross-examiner to remain at the podium, and to construe the witness's answer as: "Yes, you were afraid." (R.T. 121) However, the witness's meaning is made clear very shortly thereafter:

> "A. After we calmed down, I recall it very clearly, we got human toward one another and we talked like civil people to one another, and he said---he was trying to hold---he told me that I had made a verbal agreement on the pool tables with him, and I said, 'I don't know where I made such a thing', but he kept insisting that he did have a permanent agreement---I mean did have a verbal agreement that he was to have the pool tables, and I gave in to him on insisting that the pool tables that he had---well, I gave in to his insistence that the pool table concession had been committed although I didn't think so.
>
> Q. You didn't think so?
>
> A. I went along with him.
>
> Q. You went along with him?

A. Right.

Q. Because you were both being much more intelligent about the whole situation?

A. We went around and we discussed various things after that. We even walked around the building, as I recall.

Q. And as you were walking around the building, were you in fear?

A. I have never feared Mr. Battaglia personally.

Q. Thank you. Fine.

Now, this is the conversation where there was the threat about Serotta, right?

A. Yes.

Q. All right. This is the conversation where there was the threat about your wife?

A. That's what got me." (R.T. 122-123)

It is evident from this testimony that while Greenwell was not personally afraid, he feared for his wife, and it will be recalled that after this conversation the cocktail lounge owner, Gumbin, declined to sell out and that shortly thereafter the pool table was slashed, and that was when the fear jelled. (R.T. 188-190) Greenwell suspected Spinelli of

having slashed the pool table and threatened to poke him in the nose (R.T. 152) and was mad enough at him to hit him (R.T. 167). Further light on the authenticity of Greenwell's claim to be in fear of harm to Mrs. Greenwell must await the review of Mrs. Greenwell's testimony.

Greenwell's trial testimony is clear that his relationship with Battaglia was on a sound commercial basis until the controversy over the pool table installed in partnership with the cocktail lounge owners by Greenwell. Not only was Battaglia instrumental in bringing business to the bowling alley but, as Greenwell testified: "Tucson Vending did give or offer a better proposition than that Canteen had. The percentages I don't remember precisely." (R.T. 182). However, on prior occasions Greenwell had told the authorities a very, very different version of events. The threats to his wife, the extortion, had been responsible for the original introduction of Tucson Vending's machines because of threats to his wife made in the fall of 1963:

> "Q. Well, do you recall this question and answer, page 102 of the January 18th transcript [referring to Grand Jury minutes]:
>
> "Question: All right, that's what this statement is in terms of time.

'However, after receiving threats by Battaglia against his wife, Greenwell decided to remove Canteen's machines and install Tucson Vending.' Now is that an accurate statement, sir?"

"Answer: Well,---"

"Question: Please be as candid as you can with us."

"Answer: A remark was passed to that effect."

"Question: By whom?"

"Answer: Charlie Battaglia."

Do you recall being asked these questions and making those answers, Mr. Greenwell?

A. No, I don't, because---

Q. All right, sir, you don't recall. Now, do you recall in March of 1965---well, you tell us you don't recall appearing before the Grand Jury at that time, but in March of 1965, you appeared before the Grand Jury and Mr. Corey asked you about the time when threats were allegedly made against your wife. Do you recall him interrogating you, actually, about that?

A. No, I don't recall it at all, the interrogation.

Q. Do you recall being asked these questions and making these answers? And this is on page 47 of the March 5 minutes.

"Question: Directing your attention to a period of time when certain threats were made regarding your wife's life, do you recall that period of time?"

"Answer: It was during the fall of 1963."

"Question: Tell us about the threat."

"Answer: Well, it was during an argument---"

"Question: With whom?"

"Answer: With Charlie Battaglia."

"Question: In person or by telephone?"

"Answer: In person."

"Question: What happened?"

"Answer: Well, he reminded me of my wife and her appearance and he knew where she worked and approximate route she took home. He said, 'You would like for her to stay that way,' or something along that line."

"Question: Was this in connection with a contract agreement at that time?"

"Answer: Trying to get me to sign a contract."

Trying to get me to sign a contract. Do you recall being asked these questions and giving those answers?

A. I recall what you are talking about.

Q. No. Do you recall being asked these questions and giving those answers?

A. Not actually asking questions and---
no, no, I don't recall.

Mr. Krieger: Your Honor, may I ask Mr. Corey for a concession that I have read accurately from the transcript?

The Court: Yes.

Mr. Corey: Up to the point where Mr. Krieger stopped, of course, and up to that point it was correct." (R.T. 162-165)

Indeed Greenwell had testified under oath before the Grand Jury, first that Battaglia had never mentioned Serotta and then that the threatening and ominous allusion to Serotta had taken place in the summer of 1963:

"Q. Page 119, January 18, 1965, Grand Jury testimony. Do you recall being asked these questions and giving these answers? You had been asked questions concerning the pool table.

"Question: Did he---" Obviously he was referring to Battaglia. "Question: Did he say anything about Serotta at that time?"

"Answer: No, he never mentioned Serotta at any time."

"Question: And again let me refresh your recollection, Mr. Greenwell. 'Battaglia reminded Greenwell at the time,' now this is at the time that he insists upon servicing the machines, 'that he could end up just like Serotta did.'"

"Answer: That's right, he did say that, I remember it now."

"Question: Now was that in the summer of 1963?"

"Answer: It was during all that upheaval at that time, the summer."

Do you recall being asked these questions and giving those answers?

A. I don't recall.

Mr. Krieger: Mr. Corey concedes?

Mr. Corey: The reading was accurate."

(R.T. 208-209).

Another headon collision of his trial testimony with is Grand Jury testimony occurred when Greenwell told the

Grand Jury under oath that the threat to have a bowling ball drop through the slate top of his pool table came by phone from a voice not Battaglia's:

"Q. Do you remember Mr. Corey asking you this question: 'The incident of the slashing influenced you to remove the table?' and your responding: 'That was the beginning of it, but then when I was advised how I would like to have---that was by telephone and it was not Battaglia, it was a voice unknown to me if I remember correctly, but a phone call was received, how would I like to have a pool ball---I mean a bowling ball through the slate. That is a very costly item and I knew there would be no way in the world to police the people coming in there to find out if they were going to put a bowling ball through the slate.'

Do you recall that question and answer before the Grand Jury? Please, yes or no, sir, or "I don't recall," one or the other.

A. I don't recall.

Q. You don't recall that?

A. Not the way you put it." (R.T. 146-147)

Before leaving Mr. Greenwell, one last bit of his testimony deserves mention. On any one of Mr. Greenwell's versions of the events, by March of 1964 he had received the threats which, whether they caused him to fear for himself or his wife, caused the basis of the government's claim that there was an extortion. At that very time, or at least so Mr. Greenwell told the FBI and the Grand Jury, Greenwell became dissatisfied with the servicing of Tucson Vending and in his own words, "did a little threatening", (R.T. 199) about having Tucson's machines removed or put in storage. (R.T. 194-201)

GARNET GREENWELL (R.T. 215-229), the wife since 1963 of Jerome Greenwell, testified that in June of 1963 on through January of 1964, she worked with her husband at the Diamond Pin bowling alley after finishing her regular job, and after January ran the restaurant, usually staying from late in the afternoon until nine or ten at night. Her husband usually remained at home doing drafting in connection with his other ventures. She described her customary road home which took her through a poorly lit country road. In

the latter part of January, at her husband's insistence, she changed her route of travel home, and was told to call him when she left the bowling alley. If she did not arrive home promptly, he became upset. After some quarrels with her husband he finally related to her that Battaglia had made threats to him. When her husband told her of these threats he appeared worried. (R.T. 215-220)

On cross examination she testified that she went to the dog track, and sometimes without her husband. She testified that she likes to go dancing, and that her husband does not dance. At this point the Court, without objection from the government, intervened to close off this area of questioning, and advised counsel that it did not make any difference to the Court as the trier of fact whether or not Mrs. Greenwell was unfaithful. This, of course, missed the entire point of the line of counsel's questioning even though, as counsel pointed out, it had two obvious direct probative tendencies. The first was to show that Mr. Greenwell had other reasons to insist upon knowing when his wife left the bowling alley, and the second was to show that at the time he claimed to be taking these extraordinary precautions for her safety he was in fact permitting her to go to night clubs and race

tracks by herself, which certainly would cast some doubt on his claimed concern for her safety. (R.T. 221-226) During this period, even on the occasions when the two Greenwells went out to dinner together, they each drove their own cars. (R.T. 228)

The government next called a group of witnesses whose testimony was either cumulative, irrelevant or not directed to contested issues. DON BIERSCHBACH (R.T. 229-239) testified on direct examination that he had been the manager of Diamond Pin Lanes from February to May of 1964 and during that time he had encountered Battaglia when they were both bowling at a different bowling alley and Battaglia had told him that he was treating Spinelli roughly and that Bierschbach should keep his nose out of the quarrel between Battaglia and Greenwell or Battaglia would beat him. On cross examination Bierschbach conceded that he had had a pretty vehement argument with Spinelli prior to the incident as to which he testified and that he had told the Grand Jury that Battaglia had told him that the argument between Greenwell and Battaglia was personal.

THOMAS McCORMICK (R.T. 239-253) and NATHANIEL RAILEY (R.T. 253-260), a bowling lane maintenance man and porter

respectively at Diamond Pin Lanes, gave testimony the general effect of which was to show opportunity on the part of Spinelli and Estes who were in the bowling alley after it was closed on the night when the felt on the pool table was slashed, though McCormick conceded that he did not know whether all the doors to the bowling alley were locked that night.

HOYT WELLS (R.T. 260-267), the manager of the cocktail lounge in the bowling alley, testified to seeing the pool table in good condition at about eleven o'clock at night and observing the table slashed at about two the following morning. JACK GUMBIN (R.T. 267-283), testified generally corroboratively of Greenwell's joint purchase with him of the pool table for the bowling alley concourse, it subsequently being slashed, repaired, removed and replaced with a table from Tucson Vending. On cross examination he conceded that he was a stockholder and employee of the competitor Canteen Corporation.

The defense offered no evidence except the brief testimony of Agent EARL FAUVER (R.T. 285-295) whose testimony bore on the authenticity of some of the interview statements produced under §3500 of Title 18 with which the government witness Gumbin had been taxed in cross examination.

2. The Hearing on the Government's Use of Trespass Electronic "Bugging" Devices

At the outset we ask the government to produce in ufficient quantity so that each member of this Court may have copy, Government's Exhibit 18, the so-called logs of the lectronic eavesdropping in this case, and while we refrain rom making a pamphleteering attack on the use of eavesdrop-ing devices in general, we respectfully submit that the force nd meaning of our contentions cannot be judged apart from he logs taken in their entirety. (They were marked in evi-ence R.H. 123).

On January 11th before the trial opened, Mr. J. F. unningham, a Department of Justice attorney, disclosed to he Court and counsel the existence of trespass electronic sur-eillance in connection with the case. (R.T. 6-28) Accord-ngly the matter was set over until January 16th, at which ime a hearing was set on a motion made by the defendant (R.T. 3) to dismiss the indictment and to suppress any direct or ndirect fruits of any illegal bugging and alleging violations f the defendant's Third, Fourth, Fifth, Sixth and Ninth amend-ent rights. At the opening of the hearing, Mr. Cunningham, ho handled this aspect of the case, after reviewing the

statement of the Solicitor General and the policy of the Department of Justice, told the Court:

"Acting upon that, Your Honor, the Criminal Division was first notified that there had been microphone surveillances in this case on Friday a week ago, January 6th. The Organized Crime Section on Monday obtained the logs that had been made in connection with the surveillances and I reviewed those on the following day on Tuesday, January 10th. Immediately thereafter I left for Tucson in order to bring that to the attention of the Court and the defense counsel, which I did on the morning of January 11th. At that time I made those facts known to the Court and to the defense counsel, and the defense then filed an oral motion to suppress, in connection with which the Court ordered the Government to turn over to the defendant the logs of the conversations that had been written in the case, and which the Government then did. At that time we conceded and we do concede that the microphones were installed by trespass at

the following locations: First, at the residence of Joseph Harley Hootner, Apartment E, 930 North 7th Avenue, Tucson, Arizona, and they were operating from the period January 23, 1961, to March 13, 1961. Such microphones were also installed at the Travelodge Motel, 7370 Sunset Boulevard, Los Angeles, California, and were operated on the two day period January 12 and 13 of 1962. Such microphones were also installed at the residence of the defendant Battaglia at 1938 West Lester Street, Tucson, Arizona, and operated for the period from May 25, 1962 to October 1, 1962, and from May 9, 1963 to August 12, 1963. They were also installed at the Tucson Vending & Amusement Company, 6541 East Tanque Verde Road, Tucson, Arizona, and operated for the period June 18, 1964, until August 7, 1964. Likewise installed at the Tucson Vending & Amusement Company at 2717 East Grant Street, Tucson, Arizona, and operated during the period from September 23, 1964 to November 20, 1964. In connection with these installations, Your Honor, we are informed they were installed on the general authority of the Attorney General, and that

they were operated in connection with the FBI's continuing inquiry into organized crime and under the belief that organized crime was being conducted on those premises." (R.H. 20-22)

One of the recurrent issues which we will treat intensively in the body of our argument was the scope of the hearing. In their memorandum in opposition to the defendant's motion to suppress, the government made it very clear that it would oppose any effort by defense counsel to discover whether or not there was other illegal bugging which the government had not revealed, and took the position that the defendant was bound and limited to explore only what the government had revealed. (C.T. 75) The defendant's position was that given the wide range of electronic bugging already admitted, the defendant was reasonably entitled to explore the existence of other undisclosed bugs. It should be made perfectly plain that no aspersion is cast upon the integrity either of Mr. Cunningham or Mr. Corey who represented the Department of Justice at the trial. They undoubtedly told the Court what they knew. Not so the police agents of the Federal government. As we shall shortly demonstrate, at least one of them testified under oath in a way which would affront the credibility of any grownup and which we believe will shock this Court.

We turn now to the witnesses called at the hearing. Agent EARL FAUVER (R.H. 24-73) of the FBI, assigned to the Phoenix office, examined on behalf of the government, testified that he conducted the investigation of the case on trial from April 1964 to January 1965 as a result of a report by Mr. Greenwell to the Tucson police department. To his knowledge he never received any information connected with any microphone or eavesdropping and prior to and during the course of his investigation he never learned of microphone surveillances in connection with the defendant Battaglia; no other agent of the FBI ever suggested any other person for him to interview or leads to follow in connection with the Battaglia investigation. The Tucson police report led him to Greenwell and Greenwell led him to Ida Chapman and Don Bierschbach. Chapman led him to McCormick and Gumbin and Mr. Corey suggested Railey and Hoyt Wells as well as James Reeves, and Thompson was interviewed as the result of an independent investigation of a separate crime. (R.H. 24-33) On cross examination Fauver testified that Mr. Johnson was the resident agent operating the Tucson office of the FBI who had received the complaint from the Tucson police department and who drew the original report about the incident

which was forwarded to Phoenix, where the case, when it was officially opened, was assigned to him. Though he knew Battaglia's name from conversations with other agents he did nothing to familiarize himself with the files on Battaglia; he discussed the progress of the case with Agent Johnson. Mr. Cornet of the Tucson office of the FBI also knew that he was conducting an investigation of Battaglia. (R.H. 33-42) The case he was working was numbered 92-482; 92 refers to a Hobbs Act investigation and 482 was the number of the particular case. (R.H. 61) He looked at other cases with reference to Battaglia and Tucson Vending (R.H. 66).

The next witness was KERMIT JOHNSON (R.H. 73-219), the resident FBI agent in Tucson. Johnson's testimony is of critical importance to the issue of the bugging in two respects. First, in certain essential and material regard, Johnson swore to a story so inherently implausible and incredible that it casts a shadow of fabrication across the testimony of the government agents who testified at the hearing. Second, defense counsel was shut off from exploring perfectly proper and valid lines of inquiry with Johnson. The government's position as stated by Mr. Cunningham was that the logs turned over to defense counsel were the only

original records ever made of the bugged conversations. Mr. Cunningham told the Court: "There are no tapes". (R.T. 21). Again in its written reply to the defendant's motion to suppress, the government flatly stated: "No tape recording or other original record of these words were made" [referring to words overheard by trespass microphone surveillance].(C.T.70)

Agent Johnson testified:

"A. Yes, sir.

Q. There was no recording equipment?

A. No, we did not record it.

Q. At that time?

A. No.

Q. Did there come a time when you did record?

A. No, we have no tapes.

Q. You did not record it?

A. No, I don't recall having recorded any.

Q. Do you have tape equipment for this purpose?

A. I don't have any, no."

*** *** ***

"Q. (By Mr. Krieger) There is a reference in defendant's Exhibit D in your handwriting?

A. Yes.

Q. Is it not?

A. Yes.

Q. New tape No. 4?

A. Yes.

Q. Am I right?

A. Yes.

Q. Was there any tape recording of that conversation?

A. No, for the reason that---I can explain as to the tape.

The Court: Go ahead and explain.

A. As to the tapes. We had tape recordings, tape making equipment at the time. However, it did not function, it did not record properly.

Q. All right. How many times did you make tape recorded transcriptions of conversations intercepted in Battaglia's home---

A. I didn't---

Q. One moment, let me finish the question. How many times did you make tape recorded or attempt to make tape recorded transcriptions of conversations in Battaglia's home which did not come out?

A. I don't remember.

Q. How many times did you try?

A. I couldn't tell you exactly the number of times.

Q. Where are old tapes 1, 2, and 3?

A. Probably didn't work, to the best of my knowledge.

Q. You don't know?

A. No. There were no tapes.

Q. There were what?

A. There were no tapes that were working you could record the conversation.

Q. Where is that equipment?

A. I don't know.

Q. What kind of equipment was it?

A. You mean---

Q. What was the tape equipment?

A. Well, I don't know what the name of it was.

Mr. Cunningham: Your Honor, what difference does it make? They made no tapes. What difference does it make?

The Court: Let him go ahead.

Q. (By Mr. Krieger) What kind of equipment was it?

A. I don't know.

Q. Who checked it out?

A. Checked it out as to its working?

Q. Yes.

A. When I was handling it, I was checking it and it didn't work.

Q. It didn't work?

A. No.

Q. So you kept changing tapes?

A. Right.

Q. And you wrote down on your log, "A new tape."?

A. Right." (R.H. 76, 81-84)

Focusing now on the areas of inquiry which the Court foreclosed we find that the Court would not permit answers to the questions as to who authorized the installation of one of the microphones, even though counsel specifically pointed out that if such information were available it could be verified and the authorizing person could be subpoenaed and asked whether other trespassing microphones were installed which had not been revealed by the government. (R.H. 76-79) This line of inquiry was again cut off by the Court and again counsel persisted:

"Mr. Krieger: Your Honor, you are cutting me off from perhaps other eavesdropping.

The Court: Who cares about other eavesdropping unless it pertains to Battaglia?

Mr. Krieger: We don't know unless we know if it was conducted. I don't know what was in the other eavesdropping, if it occurred. If someone---

The Court: Just a minute, counsel. What you want to know is who authorized this particular eavesdropping and I say what materiality that has, I say go on to something else. There is no materiality who authorized this. . . " (R.H. 91-92)

The matter was pursued further and again after lengthy colloquy the Court foreclosed the inquiry (R.H. 93-99), even though it did permit Johnson to testify that he was not the one who authorized the microphone installations (R.H.125) Again the Court foreclosed an inquiry into the nature of the physical installation (R.H. 139-141). In still another area when defense counsel attempted to lay a foundation by showing that a conversation between the defendant and his then attorney who had been retained in connection with the matter which was to become the criminal case herein, the Court narrowly construing the scope of the hearing, brushed the inquiry aside (R.H.

143, 150, 165). Once more when counsel tried to probe the location of the surveilling microphones the Court found it of no materiality (R.H. 169). Ultimately counsel was able to develop the overhearing of conversations in 1964 between the defendant and his attorney, Soble (R.H. 190-193). Johnson also testified that an Agent Flynn participated in the electronic surveillance of Battaglia in his home (R.H. 170-172). No electronic surveillance was placed in the Tucson Vending office on Speedway Boulevard. (R.H. 173) After establishing that Johnson's initial report was filed under the same file number as the electronic logs---92-152---counsel moved for the production of the memorandum made by Johnson, in a perfectly reasonable effort to see whether there was spillover from the electronic surveillance into the government's case, specifically suggesting that it might show efforts to lead or correct the witness Greenwell's memory on the basis of its electronic surveillances (R.H. 206-216).

Counsel was thus effectively foreclosed from testing or pursuing the government's use of its admitted trespass electronic surveillances or the existence of undisclosed surveillances.

JIMMY G. ADCOCK (R.H. 219-227), a former sergeant with the Tucson police force serving in the intelligence unit,

was called and defense counsel sought to examine and to prove by his testimony that Agent Flynn, since deceased, of the Tucson office of the FBI, had told him while they were both surveilling Battaglia that the FBI had installed electronic bugging devices at the 3533 East Speedway office of the Tucson Vending and Amusement Company, a location not covered by the logs in the government's possession. The Court, as we shall argue at length below, gravely erred in refusing to admit this competent and material testimony.

JOSEPH SOBLE (R.H. 227-236), who had served as attorney for Tucson Vending and for the defendant Battaglia personally, testified that sometime after March 1964 he had conversed with Battaglia who had told him that there had been an argument with Greenwell, the owner of Diamond Pin Lanes, which might be misconstrued and twisted by someone, and that he had had various conversations with Battaglia about the problems of Tucson Vending and the situation with Greenwell at Battaglia's home and the office located on Speedway Boulevard and the office located on Tanque Verde.

JAMES W. CORNET (R.H. 236-250), an investigative clerk in the Tucson office of the FBI, testified that he listened by means of eavesdropping devices to conversations

that Battaglia had. He was originally instructed by Mr. Flynn to listen to the conversations coming from Battaglia's home and from other locations. He testified that the recording equipment did not work as far back as when he first came to the office in 1961 and no one ever bothered to fix it. (R.H.242)

One further matter: an AGENT SNELL had been referred to during the course of Agent Johnson's testimony and again by Mr. Cornet as having installed the microphones in Tucson. Defense counsel desired his production and indicated that he would examine him about the physical installations he made and explore who gave the orders and develop the full extent of eavesdropping. The Court ruled this testimony immaterial, (R.H. 175-187), and after Mr. Cornet's testimony the Court reiterated its ruling and made it abundantly clear that it would not have heard Snell's testimony. (R.H. 251-252)

III. SPECIFICATIONS OF ERROR

I. It was error for the District Court to convict the defendant (R.T. 314) in that there was insufficient evidence to support a finding of:

(a) an interference with interstate commerce [treated with detailed quotations and citations to the record in our Point I-A, page 43-51 , infra];

(b) an extortion [treated with detailed quotations and citations to the record in our Point I-B, page 52-55, infra].

II. The District Court erroneously restricted the cross examination of the key government witness, Mrs. Greenwell [treated with detailed citations to the record, including the grounds advanced for the questions and the basis of the Court's ruling, in our Point II, page 56-59 , infra].

III. In regard to the government's use of trespass electronic eavesdropping surveillance, the District Court erred by:

(a) Failing to suppress the government's evidence offered at trial [treated with detailed references to the record in our Point III-A, page 61-65 , infra];

(b) Failing to dismiss the indictment because of the eavesdrop intrusion into conversations between Battaglia and his attorney, Soble, in violation of the Sixth Amendment [treated with detailed references to the record in our Point III-B, page 65-68 , infra];

(c) Failing to dismiss the indictment and bar the prosecution because of the pervasive invasion of the defendant's rights by the government's use of electronic

surveillance [treated with detailed references to the record in our Point III-C, page 69-71 , infra];

(d) Improperly restricting the scope of the defendant's inquiry at the hearing into the government's use of electronic surveillance [treated with detailed references to the record in our Point III-D, page 71-77 , infra].

POINT I

THE EVIDENCE AGAINST BATTAGLIA IS INSUFFICIENT TO SUSTAIN THE CONVICTION

The leading case of Stirone v. United States, 361 U.S. 212 (1960) sets out that:

> " * * * there are two essential elements of a Hobbs Act crime: interference with commerce, and extortion." (Id. at 257)

We respectfully submit that even viewing the evidence in a light favorable to the government, there was an insufficiency of proof as to each element.

A. The Failure of Proof as to Interstate Commerce

The Trial Court, when it found the defendant guilty, leaned heavily on the fact that the pool table question as established by the stipulation (C.T. 83-89), had been ordered from a local representative who in turn had ordered it from out of the state and then delivered it to the Diamond Pin bowling alley. (R.T. 309) Though not mentioned specifically by the Trial Court, the same stipulation also establishes that the replacement pool table likewise came from an out-of-state to a Phoenix company and from a Phoenix company to

Tucson Vending. It was here that the Court found the interstate element. Indeed the proprietor, Mr. Greenwell, testified that Diamond Pin Lanes was not located on a highway but on a side street and that his business was "Tucsonian". (R.T. 157) The question thus becomes, assuming without conceding that there was an extortion, whether the mere fact that the victim of the extortion had made some purchases from sources which relied on interstate commerce was enough to bring it within the act. The act however, is couched in terms of an effect on interstate commerce, and the effect must occur. As this Court said in Carbo v. United States, 314 F.2d 718 (9th Cir. 1963) at 732: " * * * any area is included so long as the necessary effect upon interstate commerce results." (Emphasis supplied.) This Court also noted in Carbo, supra, at 732, that the act is primarily directed against labor racketeering. Of course it is not limited to labor racketeering, but Carbo is a good illustration of the kind of burden on interstate commerce which needs to be found. In Carbo the Court specifically alluded to the fact that the boxing matches were televised and broadcast into other states. (Id. at 747) Not only did the Carbo case emerge, as the Court pointed out, from a background of Federal anti-trust litigation, but in

connection with one set of promotions both the ABC and NBC networks were involved, and sums of 180 thousand dollars a week were concerned. (Id. 724-725) Though the District Court referred to Carbo (R.T. 308) when it found the defendant guilty, we think Carbo was hardly controlling in the government's favor. Taking a view of the evidence most favorable to the government, one pool table was removed from Diamond Pin Lanes, a local bowling alley, and replaced by another. It could hardly seriously be argued that a robbery in which a gold inlay is knocked out violates the Hobbs Act, even though the gold came from interstate, or indeed foreign, commerce, to the dentist's office, nor, we submit, would the fact that the dentist replaced the inlay with new gold which had an interstate or foreign source. Examination of the Stirone case, both in the Supreme Court and the Circuit Court, is illuminating. The victim in Stirone was a concrete supplier; he drew his sand from interstate shipments and at the time of the case his cement was being used to construct a steel mill which ultimately was to ship steel in interstate commerce. We note of course immediately one striking ground of difference: in Stirone there was a continuous flow of sand in from interstate commerce and presumably a continuous

flow of steel out into the stream of interstate commerce. The indictment rested only upon the flow of mixing materials to the victim's concrete plant. The Trial Court had submitted both the inflowing materials and the ultimately outflowing steel from the eventually-to-be-completed plant as grounds for the jury's consideration. In the Circuit Court the variance was treated as harmless, but Judge Hastie, later joined on petition for rehearing by Chief Judge Biggs, wrote:

> "The extortionate threat was made against a local supplier of mixed concrete. It is entirely speculative whether or not preventing this single materialman from furnishing mixed concrete on the construction job he was serving would have affected even future interstate commerce. Was concrete in abundant or short supply? Were there other materialmen ready and anxious to supply without delay the concrete needed for the job? The record tells us nothing. But without some proof that the loss of this supplier would in fact have some delaying effect on the eventual productivity of the mill, any suggested ultimate effect even on interstate commerce several steps removed is speculative to an extreme degree.

* * *

It is true that "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." See United States v. Women's Sportswear Mfgs. Ass'n, 1949, 336 U.S. 460, 464, 69 S.Ct. 714, 716, 93 L.Ed. 805. But this figure of speech carries with it the idea that the "squeeze" must be real and the "pinch" uncomfortably perceptible.

On the present record no more can be said than that what was done to an entirely local business might conceivably have future impact on commerce. Most certainly not even a likelihood of actual impact upon interstate commerce can properly be said to have been proved beyond reasonable doubt. Yet that at least was the burden the government undertook to bear in this criminal case.

Finally, it should be considered and kept in mind that the control and punishment of local extortion is primarily the business of local or state government. The Hobbs Act is an auxiliary

and partially duplicating federal superimposition on state law enforcement. In the view of Congress this is a desirable measure of federal assistance to the states in the exercise of their police power. But where state power and responsibility are thus primary and the national government is merely performing an auxiliary function, we should not be eager to stretch federal jurisdiction to cover doubtful cases offering only a tenuous or speculative theory of federal jurisdiction. See Schwartz, Federal Criminal Jurisdiction and Prosecutors' Discretion, 1948, 13 Law and Contemporary Problems, 64, 70. We should insist that federal jurisdiction be clear before imposing federal sanctions in an area of primarily local concern." (United States v. Stirone, 262 F.2d 571 [3rd Cir., 1958] at 579.)

In the Supreme Court, the Stirone case, supra, was explicitly decided on the variance point. The Court found the theory of interference with the outflow of steel from the mill which was to be constructed a "difficult question", and implicitly, we think, lent great weight to the view of

Judge Hastie quoted above. The Court speaks of the "blockage" (361 U.S. 212, 216) of commerce, and of commerce being burdened (361 U.S. 212, 218).

The critical point, of course, is that not every extortion directed against a local business which has some interstate character falls within the ambit of the Hobbs Act. It is only when, in Judge Hastie's phrase, there is a real squeeze and an uncomfortably perceptible pinch affecting interstate commerce that Federal jurisdiction comes into play. This point is vividly illustrated in United States v. Critchley, 353 F.2d 358 (3rd Cir., 1965). In that case a union officer extorted four thousand dollars from a roofing contractors organization. The roofing contractors were using in New Jersey slag roof from Pennsylvania. The nature of the extortion was that the defendant complained to a public housing authority that below-specification materials were being used in the construction undertaken. Here again we note that the case deals with a continuing, ongoing, repetitive supply of materials. In any event, the Court found that the threat to make the complaint or even the making of the complaint, though it obviously would have vexed and harassed the victims, would not have

constituted an interference with interstate commerce, and directed the entry of a judgment of acquittal.

Even though at one time Greenwell had told a story about being obliged to take on a line of vending machines (R.T. 162-165), a situation which might have presented a very different question, he abandoned that story and the indictment makes plain that the government's case rests upon "a coin operated pool table device" (C.T. 5) and the government's bill of particulars confirms that it was solely concerned with the replacement of a single coin operated pool table device (C.T.22). Any attempt in this Court by the government to justify or sustain the conviction on any basis except the single coin operated pool table would, of course, run afoul of the variance holding of Stirone v. United States, 361 U.S. 212 (1960). It would be disingenuous not to recognize what this Court knows from the explicit testimony of Agent Johnson (R.H. 216-217) and the general context of the hearing on the use of electronic surveillance against the defendant: Battaglia had been a target of the FBI since 1961 and his name appeared on some sort of a list of persons thought by the Federal police to bear an evil reputation. What has happened is that the government in its zeal to get Battaglia is asking this Court to

expand and distort the Hobbs Act. We discuss below the various theories propounded and abandoned by Greenwell as to what happened factually. At this point we focus on the issue as to interstate commerce. The sound principle of federalism enunciated by Judge Hastie in the Circuit Court Stirone case, supra, is more important to the impartial administration of justice than the conviction of Battaglia because he is on some sort of list or other. If the removal and replacement of a single pool table are enough to invoke the Hobbs Act, then it is hard to see in reason why the robbery of a wrist watch, surely an item of interstate commerce, is not also sufficient to invoke Federal jurisdiction under the Hobbs Act. Such a result is manifestly unreasonable.

We respectfully submit that however commendable the government's zeal may be in this case, on the one-pool-table indictment they drew and the proof they adduced in support of it, they utterly failed to meet the minimum standards of an effect on interstate commerce. We respectfully submit that on this ground alone, Federal jurisdiction having been shown to be lacking, this Court ought to reverse with a direction to the District Court to enter a judgment of acquittal.

B. The Failure of Proof as to Extortion

The decision of this Court in Carbo v. United States, 314 F.2d 718 (9th Cir., 1963), sets out at 740 the rule that to prove a substantive act of extortion it is essential to show the generation of fear in the victim. Unlike an attempted extortion, where an endeavor to instill fear is sufficient, or a conspiracy, where a plan to instill fear is sufficient, the present case involves a conviction for the substantive crime of extortion. We recognize that at this juncture the government is entitled to have the evidence viewed in a light favorable to it, but that does not mean in a light which defies reason. It must be possible on the record for reasonable men to conclude that the defendant's guilt was proved beyond a reasonable doubt. (Curley v. United States,160 F.2d 229 cert. den. 331 U.S. 837 [1947]. Compare: United States v. Valenti, 134 F.2d 362 cert. den. 319 U.S. 761 [1943].) Though the Trial Court has, of course, wide power to resolve contested issues of fact, we think the appellate scope of review is broader where trial was before the Court than where trial was before a jury which for historical reasons appellate courts have been more reluctant to review. (Cf. United States v. Maybury, 274 F.2d 899 [2nd Cir. 1960].) The Trial Court's finding here

was based on such extraordinary reasoning that we respectfully submit that this Court should reverse it. In finding the defendant guilty the Trial Court noted many instances (R.T. 312) of inconsistent statements to the Grand Jury, the FBI, and the Tucson police on the part of Greenwell. The Court then went on to suggest that when something unpleasant happens people try to forget it, but "gradually the time passes and the strain is relieved". (R.T. 313) On this basis, apparently, the Court concluded that Greenwell's trial testimony was to be believed in preference to his earlier statements and earlier sworn Grand Jury testimony. Such certainly is not the general rule. United States v. DeSisto, 329 F.2d 929 (2d Cir.) cert. den., 377 U.S. 979 (1964), and authorities there cited. See also: United States v. Borelli, 336 F.2d 376 (2d Cir. 1964). However, there is no need in this case to resort to general propositions or construct a speculative psychology of memory. We have the flat testimony of Greenwell himself (R.T. 123) that his present memory was poor and his earlier statements and testimony more accurate, quoted supra, at pages 12-14 in our Statement of the Case. We have confined ourselves in our Statement of the Case to the major inconsistencies in Greenwell's testimony and inconsistencies with prior sworn testimony primarily before the Grand Jury. Of course a witness may be picked at

with trifling variations of description or time of day and the like, but the inconsistencies here represent wholly contradictory versions of the events. Greenwell's trial testimony was that the threats and extortion concerned only the single pool table which was the subject matter of the indictment and which occurred around December 1963 or early January 1964. His earlier statements reflected that the threats and fear for his wife induced him to enter into the original arrangements for the placement of Tucson Vending's machines. (Statement of the Case, supra, at 17-20 ; R.T. 162-165). Such wholly diverging accounts, we submit, reduce the witness's credibility below the minimum required for a criminal conviction.

Inconsistencies apart, Greenwell's testimony about his state of fear also leaves a gaping hole in the prosecution's case. Greenwell testified that he was never afraid of Battaglia (Statement of the Case, supra, at 16 ; R.T. 123); that he threatened to punch the presumed pool table slasher, Spinelli, in the nose (Statement of the Case, supra, at 17 ; R.T. 152, 167); and that his only fear was for his wife's safety (Statement of the Case, supra, at 16 ; R.T. 122-123). But the hollowness of this claim is demonstrated

in two ways: first, in March of 1964 when he was supposedly in terrorem after the threat to his wife, after she had changed her route of travel, he "did a little threatening" of his own and contemplated getting into a controversy about having Tucson Vending's machines summarily removed (R.T.199; 194-201); second, he never even troubled to pick his wife up when she worked late at the bowling alley during the period of supposed maximum danger and when they dined out together each drove home in separate cars. (R.T. 221-226; 228) We complain in Point II, infra, that we were unduly restricted in cross examination of Mrs. Greenwell, but we submit that even that limited amount of examination which was permitted by the Trial Court was heavily suggestive of the falsity of her husband's claim of a fear for her safety. While we have focused on certain key features which demonstrate Greenwell's unreliability as a witness and the woeful deficiency of any proof of fear, we close by pointing out that Greenwell testified that aside from the pool table incident, his commercial relationship with Tucson Vending had been a profitable and beneficial one (R.T. 84-88; 182). There was ample commercial motive for Greenwell to have acquiesced in the replacement of the pool table.

POINT II

THE TRIAL COURT PREJUDICIALLY LIMITED THE CROSS EXAMINATION OF ONE OF THE GOVERNMENT'S KEY WITNESSES, MRS.GREENWELL

It will be recalled that Mr. Greenwell, the proprietor of the Diamond Pin Lanes, maintained that his fear was not for himself, but for the safety of his wife, and that he asked her to take a better-lit route home when she worked at the bowling alley. She testified on direct examination of being told of the threats only after she had taken the different route home at her husband's insistence for some period of time. Her husband usually worked at home and when she finished her duties as manager of the restaurant she drove home alone. Early in 1964 her husband insisted that she take a different route home, call when she left the bowling alley, and he appeared very upset when she didn't arrive home within the allocated time after the call. After a period of time she quarreled with her husband and he told her of the threats Battaglia had supposedly made against her safety. At that time her husband appeared very concerned and worried.(R.T. 216-219) On cross examination counsel started by developing the fact that she went to the dog track without her husband

and that she liked to go out dancing even though her husband did not dance. When counsel put a question to her about finding other dancing partners, the Trial Court, without any objection having been raised by the government, cut in to inquire what the materiality of the question was. Counsel indicated that at least one ground of materiality was to show that she might have given her husband cause for jealousy which might account for his upset appearance and his apprehensiveness about her prompt return home (R.T. 223). Another obvious ground argued by defense counsel (R.T. 304) was that at a time when he claimed to be in fear for her safety he permitted her to go out dancing unescorted. Counsel made an offer (R.T. 223) to show that she had been in a particular night spot. The Court then went on to say that even if she were the most unfaithful person in the world her husband "might very well love her very much and know that she is a very unfaithful person. I don't think it has any materiality here." The Court continued: "I don't think we'd better pursue this any further. I don't want to hear any more about what she does, her activities, any further.* * *" (R.T. 224) For another full page the Court reiterated its view that the questions were not directed at probative matters and reasserted that it had "common knowledge" of the fact that many

people "have a high regard" for husbands and wives who are unfaithful. Then in a sudden reversal, while reiterating its view that there was no probative value, the Court said: " * * * rather than sustain the objection on my own motion, you go right ahead." (R.T. 225) Defense counsel, quite reasonably, we submit, in view of the Court's evident hostility to the line of questioning, moved to something else rather than risk the further ire of the trier of fact. With all due deference to the District Court, the learning of mankind from Solomon, who tells us: " * * * jealousy is cruel as the grave: the coals thereof are coals of fire, which hath a most vehement flame" (The Song of Solomon, Chapter 8, verse 6), to the modern science of psychiatry (Abrahamsen: Crime and the Human Mind, New York 1944, Chapter 8, "The Background of Murder" page 162 et. seq.) is that jealousy is a powerful, distorting and anxiety-producing emotion.

We go back to the leading case of Alford v. United States, 282 U.S. 687 (1931), to demonstrate that what the Court did here was improper. Cross examination was there held to be exploratory and the Court said that it was not usually appropriate to require a disclosure of the purpose of an inquiry, nor is it necessary in order to establish

prejudicial error to show that the examination would have been successful. (Id. at 692) The examination up to the point where the Court cut in had not been lengthy. The questions were designed to contradict the witness's testimony in chief about her husband's state of mind and her own and to cast serious doubt on the government's theory of the case. We submit, most respectfully, that Alford, supra, establishes once and for all that cross examination is a right and not a privilege. That right was denied to Battaglia as to a critical government witness. We urge this Court to reverse the conviction and afford him a new trial at which he will have an opportunity to exercise the right of cross examination.

POINT III

THE TRIAL COURT ERRED BY FAILING TO DISMISS THE PROSECUTION WHICH WAS FATALLY TAINTED BY THE GOVERNMENT'S USE OF ELECTRONIC "BUGGING" SURVEILLANCE AGAINST THE DEFENDANT BATTAGLIA IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS; IT FURTHER ERRED BY IMPROPERLY AND UNREASONABLY RESTRICTING THE SCOPE OF THE DEFENDANT'S INQUIRY AT THE HEARING ON THE DEFENDANT'S MOTION DIRECTED AGAINST THE ELECTRONIC SURVEILLANCE.

The Trial Court focused its attention on the issues and procedure of the hearing as though it were strictly analogous to a hearing on the suppression of tangible evidence obtained by the government as the result of unlawful search and seizure, that is to say, as if the sole issue were whether the government's case was derived from the products of an unlawful search and seizure. In the defendant's motion (C.T. 63-64) not only is the traditional suppression asked for, but also an outright dismissal with prejudice against the government's renewing the charges is asked for, and the Third, Fourth, Fifth, Sixth and Ninth Amendments to the Constitution are explicitly relied on. We will treat separately in turn the traditional search and seizure aspect; the intrusion against the Sixth Amendment right to counsel; the proper scope of the defendant's remedy where the bugging has the pervasive and intrusive

character shown here; the Trial Court's improper blocking of the defendant's attempt to develop the full facts, including surveillances not disclosed by the government. Every one of these aspects, we respectfully argue, warrants and indeed requires a reversal of the conviction, or at very least a remand for a full hearing which will present a proper record for the review of this Court.

A. The Issue Viewed, as the Trial Court Did, as Turning Solely on the Use of the Products of the Government's Illegal Activity in Developing the Evidence Presented at Trial.

Even though for the reasons set out below we urge that the government's view accepted by the Trial Court was erroneous, nevertheless on that view the case should be reversed. The sole witness proffered by the government at the hearing, Agent Fauver, testified on direct examination (Statement of the Case, supra, 31-32 ; R.H. 23-73) that he investigated the matters which came to be the case against Battaglia as a result of a complaint made to the Tucson police department, and that all the other witnesses were developed either as result of conversations with Greenwell and the people suggested by Greenwell, or as a result of suggestions made by Mr. Corey, the Department of Justice attorney who conducted the Grand Jury proceedings and the trial on the merits below.

Mr. Corey has represented that he did not know of the electronic surveillances and we take,and are happy for this Court to take,that representation without question. If there were nothing further to the matter, under the view of the case we are now discussing, the government's showing would be strong and the defendant's weak. However, Agent Fauver was from Phoenix, and while conducting this investigation he was in contact with the investigative clerk, Cornet, (Statement of the Case, supra, 32 ; R.H. 236-250) and with Agent Johnson (Statement of the Case, supra, 31-32 ; R.H. 73-219), both of whom actually listened in through the bugging devices. Agent Johnson had been investigating Battaglia since 1961 (216-217). His file number on Battaglia was 92-152 and the original report from the Tucson police to the local FBI went forward to Phoenix under that file number (R.H. 205-207). The number 92 was the FBI administrative number for an anti-racketeering or Hobbs Act investigation. The case which Agent Fauver undertook (this case) had an FBI number of 92-482, and yet it was Fauver's testimony that although he went from Phoenix to Tucson to investigate Battaglia he never looked at the Tucson file of an active investigation of the same crime, of the same man against whom he was conducting an investigation. (R.H. 61, 66)

Of course the Trial Court saw and heard the witnesses, but we submit that no demeanor or look of official candor radiating from FBI witnesses can make plausible this narrative in which Agent Fauver eschews the opportunity to learn what Agent Johnson's investigations had revealed against Battaglia and Agent Johnson disdains to tell his brother officer what he knows. Perhaps this is not enough to upset the government's initial showing, but when it is combined with Agent Johnson's testimony about there being no tapes we submit that the boundaries of credibility are overstepped. That testimony is set out in our Statement of the Case, supra, at 33-36 and appears at R.H. 76-84. That testimony shows, we submit, an effort by one of the government's police agents to conceal from the Court an important part of the factual background of the investigation and to cover up that concealment with a fabrication. In order to believe Johnson's testimony one first has to explain why he initially maintained that he had no tape equipment for the purpose of making recordings and then believe that though the FBI had the technical capability of installing microphones in a man's home and place of business they lacked and could not obtain the technical capability required to fix a tape recorder, and that rather than fix the machine Agent Johnson tried, and made note of, a succession of wholly unsuccessful

tapes. Indeed investigative clerk Cornet, Johnson's fellow listener on the eavesdropping, testified that the tape machine in the Tucson office had not worked since 1961 and that no one had bothered to fix it. (R.H. 242) The machine, according to the testimony of the government, was little more than an artifact, an objet d'art, remaining useless and inoperative during the period from January to March of 1961, May to October of 1962, May to August of 1963, and June to August of 1964, when according to the government (see statement of Mr. Cunningham R.H. 20-22 quoted in our Statement of the Case, supra 28-30) electronic surveillances of the Battaglia home, business and associates were had. This obviously was not a satisfactory state of affairs as far as the FBI was concerned, because Agent Johnson must have wanted to use the tape recorder when he put four different tapes on it in an effort to obtain a recording, but if Johnson and Cornet are to be believed, putting four different tapes on the machine represented the maximum effort the FBI could mount (over the period from January of 1961 until August of 1964) to get its tape recorder fixed.

This endeavor by police agents of the Federal government to falsify the facts and to mislead the Court (and perhaps the attorneys of the Department of Justice as well) calls for

the invocation of the well-known doctrine that fabrication and spoilation of evidence give rise to a presumption that the truth is unfavorable to the fabricator's position. When the deception about the making of tape recordings of the electronic surveillances is considered along with the inherent improbability of the existence of a "wall of separation" between what Johnson knew and had learned from the bugging, and Fauver's investigation of Battaglia, we submit that the government's case is so weakened and tainted that the government has failed to carry its burden.

B. The Government's Violation of Battaglia's Sixth Amendment Right to Counsel

Joseph Soble, a Tucson Attorney, who represented Battaglia and filed motions on his behalf and continued to act as local counsel through the proceedings in the District Court, testified that in the spring of 1964 Battaglia had related to him his version of an argument with Greenwell and his (Battaglia's) apprehension that it might be twisted, and from time to time they subsequently discussed the problem at Battaglia's home and the offices of Tucson Vending, certainly through July or August of 1964. The FBI admitted that on 7/14/64 they overheard a conversation between Battaglia and Soble. The Trial Court was strenuously disinterested: "It

shows overhearing what a client and his attorney say, but what materiality?" (R.H. 165) (We complain below, D, infra, that the Court refused to permit counsel to develop the location of this surveillance.) The test of the materiality to the Court was solely whether the FBI'S illegal activity led to the development of the case. The Court insisted that counsel show a relationship between the proposed evidence of Greenwell and the illegal activity (R.H. 164-165). This is but one of many examples of the Court's view that the only possible issue was whether the Greenwells had been discovered by the FBI as the result of bugging, but the defendant's motion specifically relies on the Sixth Amendment (C.T. 65) and the affidavit in support of it refers to the intrusion in the relationship with Battaglia's attorney, Mr. Soble (C.T. 66). If the Trial Court's view were correct, then once a complainant is discovered by innocent means the Federal police are free to endeavor to overhear, electronically or otherwise, confidential conversations between the defendant under investigation or indictment, and his lawyer. Such, of course, does not even begin to be the law. Though it is not necessary to our conclusion, we point out most emphatically that there was never any suggestion or hint that Mr. Soble and Mr. Battaglia were

engaged in any improper, unworthy or illegal activity. The most recent and definitive pronouncement of the Supreme Court of the United States compels a reversal. In that case, United States v. Hoffa, 385 U.S. 293 (1966), a government informer reported the activities of defense counsel during a criminal trial(known for purposes of the opinion as the "Test Fleet case") or at least so the Court assumed for the purposes of deciding this issue. (Id. 306) At a subsequent trial for tampering with the jury in the Test Fleet case, the defense of a violation of the Sixth Amendment privilege was raised. While the Court rejected that defense as to the jury-tampering conviction, it flatly said: "* * * if the Test Fleet trial had resulted in a conviction instead of a hung jury, the conviction would presumptively have been set aside as constitutionally defective. Cf. Black v. United States. . . " (Id. 307) The Court approved the holdings of Caldwell v. United States, 205 F.2d 879 (D.C. Cir. 1953) and Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951). The Black case to which the Court refers, United States v. Black, 385 U.S. 26 (1966) is extremely close to the situation in this case. There the investigating agents were pursuing a criminal investigation and incidental to it overheard conversations between a defendant and his lawyer,

C. The Indictment Should Have Been Dismissed and the Government Barred from Prosecuting Battaglia for Offenses Which it Sought to Discover by Pervasive Electronic Intrusions into the Privacy of his Home and Offices

We explicitly asked in our motion (C.T. 63) that the indictment be dismissed and the government barred from prosecuting Battaglia for the offenses covered by the indictment.

Though defense counsel continued on a number of occasions to return to the broader questions and referred to other Amendments ranging from the Third to the Ninth, the Court typically ignored these contentions and focused on the search and seizure question, e.g., R.H. 140. While the suppression of evidence which is the result of illegal activity on behalf of the government is a remedy, it is by no means the only remedy. Where the Federal government destroys a defendant's rights under the Fifth Amendment by compelling him to testify in the face of a claim of the privilege against self-incrimination, the government is barred from prosecuting him; it must confer "absolute immunity" against further prosecution for the offense to which the question relates. Counselman v. Hitchcock, 142 U.S. 547 (1892), at 585, 586. The vitality and correctness of Counselman in stating the Federal standard was recently affirmed in Albertson v. Subversive Activities

Control Board, 382 U.S. 70 (1965). Though as a matter of abstract logic the sanction for the violation of the Fifth Amendment right to silence could be a mere prohibition of the use of evidence derived from that violation, that is, a requirement on the government to show an untainted source for its case. Cf. Malloy v. Hogan, 378 U.S. 1 (1964) and Murphy v. Waterfront Commission, 378 U.S. 52 (1964). Nevertheless it is firm Constitutional doctrine that a Federal invasion of the Fifth Amendment privilege bars prosecution in the area of the invasion, whether or not the case comes from an independent source. We think that that is the appropriate remedy here. The intrusions into Battaglia's office, and more importantly into his home, over so long a period of time, offend against his rights to be free of a general search, Berger v. United States, _____U.S._____(1967); 18 L. Ed. 2d, 1040, and destroyed the privacy and sanctity of the home and marriage which the Third, Fourth, Fifth and Ninth Amendments taken together set beyond the reach of state power. Griswold v. Connecticut, 381 U.S. 479 (1965). We submit that only a flat bar to prosecution will be an effective deterrent and an adequate vindication of the defendant's rights against electronic bugging. The special vice of such snooping is that, unlike

the search by police for tangible objects, the victim is unaware of the violation of his rights. When the violations do come to light it is generally by grace of the government's disclosure and the defendant is largely at the mercy of the government as to discovering the facts of what occurred. Thus in the Black case, Black v. United States, 384 U.S. 927 (1966) and 384 U.S. 983 (1966), it was only after certiorari had been denied that the government disclosed existence of the bugging of conversations between Black and his attorney. We submit that where the defendant is so peculiarly at the mercy of the government to inventory its own wrongdoing, the rule of the immunity cases rather than the rule of the search cases is the proper and effective one. In this case the bugs were maintained well into the period of the events covered by this investigation, and maintained with a specific view to prosecuting Battaglia under the very statute for which he stood trial.

Though we think this Court has the power to do so, we recognize that it may be reluctant to invoke the remedy we ask for here, absent a controlling decision of the United States Supreme Court, but we wish to make our claim firm so that in the event of the necessity of further review we may present it to the Supreme Court.

D. The Court Improperly Restricted the Scope of the Defendant's Inquiry as to the Government's Electronic Surveillances

The Court abbreviated the inquiry into the violation of the defendant's Sixth Amendment privilege, as we detail, supra, 65-68 . The Court refused to permit inquiries which sought to discover who authorized the installation of the microphones. [The colloquy with the Court is quoted supra, [37], in our Statement of Facts (R.H. 91-92)]. The Court, without objection from the government, blocked inquiry into the physical nature of the installation (R.H. 140-141). The Court refused to allow inquiry as to the location of the microphones which accomplished the surveillance (R.H. 167-169), and refused the production of Agent Johnson's memoranda which were filed in the same file with the electronic logs (R.H. 207-216). The Court refused to hear the testimony of the witness Adcock (R.H. 219-227), a former officer of the Tucson police intelligence unit, who had conducted surveillances, along with an FBI agent, of Battaglia, and had been told by that agent that there was an electronic surveillance at a location which the government's concession did not include. The Court rested its ruling on an evidentiary ground: the repetition on the

stand by former Sergeant Adcock of the Tucson police of what Agent Flynn of the FBI (since deceased), had told him was, in the Court's view, hearsay. Counsel argued that it was an admission against interest (R.H. 225). Clearly an admission made by an agent of the government which contradicted the government's repeated contention that it had disclosed all of the surveillances,was an admission against its interest. Agent Flynn was, very literally, an agent of someone, and that someone was the Federal government. His stating a fact to Adcock which was contrary to the government's interest and position at the hearing was competently admissible through Adcock as an exception to the hearsay rule. (4 Wigmore: On Evidence, 3rd Ed., §1048, §1078).

The Court likewise refused to hear the testimony of Agent Snell, who had actually made the physical installations, on the ground that his testimony would have been immaterial (R.H. 183-187; 251-252). An obvious purpose of these inquiries was to show the existence of other undisclosed surveillances. We think they were additionally necessary to give a full and meaningful picture of what transpired to this Court. Some of these inquiries were exactly like the ones which the Supreme Court required the Solicitor General to

furnish in the Black case. In its memorandum preceding the reversal, at 384 U.S. 983 (1966), the Court required the government to disclose the particular kind of apparatus, and the persons who authorized the installation, as well as other information. It seems strange that matters which the Supreme Court felt germane to its determination of an issue of electronic surveillance should be consistently held immaterial by the District Court here and denied to this Court on this review.

The crux of the government's contention, wholeheartedly adopted by the District Court, was set out in its written reply to the defendant's motion (C.T. 69) and its memorandum on the scope of the hearing (C.T. 75). Relying on Nardone v. United States, 308 U.S. 338 (1939), the government argued that the scope of the hearing was limited to the government's concessions, and that the defendants could not at the hearing attempt to develop other undisclosed bugs unless they first established the existence of such bugs. Aside from the circularity of such reasoning, it represents a misplaced reading and reliance on Nardone. Mr. Justice Frankfurter's opinion makes perfectly clear that the rule is a rule of judicial administration; it was designed to prevent an exploration

of the government's evidence before trial. (Id. at 342) That rationale, of course, has no applicability here. The government, even on its theory, was obliged substantially to disclose its evidence and show it to be untainted by its admitted taps. Furthermore, the blocked inquiries related not to the substantive evidence to be produced at the trial, but to the techniques, identity and activity of government police agents who were not, and indeed could not have been, called at the trial. The other important rationale is that to give a hearing in every case where there was a naked claim of eavesdropping activity would "* * * subordinate the need for rigorous administration of justice to undue solicitude for potential and, it is to be hoped, abnormal disobedience of the law by the law's officers." (Id. at 342) But that rationale is entirely without relevance in this case. The government had admitted its trespass installation of trespass microphones in violation of the Fourth Amendment. This was no interruption of orderly judicial proceedings to see whether the government had possibly indulged in some wickedness; the government had admitted its wrongdoing but insisted that its inventory of the wrongdoing was binding and conclusive upon the defendant. It is understandable that the government should concentrate on its repentance and wish to minimize its wrongdoing. How gross an

intrusion of the defendant's Constitutional rights is involved here may be seen in the determination of the United States Supreme Court in the recent case of Berger v. New York, _____ U.S. _____(1967), 18 L. Ed. 2d, 1040, and in particular the condemnation by the Court for the renewal for two month periods of the eavesdropping and the failure to require a prompt return. (Id. at ; 18 L. Ed. 2d at 1052, 1053). The Court noted that "* * * Fewer threats to liberty exist which are greater than that posed by eavesdropping devices* * * " (Id. ; 18 L. Ed. 2d, 1054), and against that consideration, in language most apt to the situation at bar, wrote:

> "By its very nature eavesdropping involves an intrusion on privacy that is board [sic] in scope. As was said in Osborn v United States, 385 US 323, 17 L ed 2d 394, 87 S Ct 429 (1966), the "indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments," and imposes "a heavier responsibility on this Court in its supervision of the fairness of procedures . . . " (Id. ; L. Ed. 2d, 1050)

There is ample support to be drawn from the fantastic story of Agent Johnson about the non-existence of the tapes, and from the refused testimony of former Sergeant Adcock of the Tucson police that the FBI had told him about bugs other than those disclosed by the government, for the belief that a full adversary hearing on the government's bugging would disclose a very different state of facts for the judgment of a District Court or the review of this Court. We respectfully submit that the especially heavy responsibilities of supervision in connection with eavesdrop bugging of which the Supreme Court speaks in Berger, supra, require that this case be reversed and a new trial ordered, or at very least be remanded with instructions to the District Court to hold a full hearing. Black v. United States, 385 U.S. 26 (1966).

CONCLUSION

THE CONVICTION OF THE DEFENDANT BATTAGLIA SHOULD BE REVERSED WITH INSTRUCTIONS TO THE DISTRICT COURT TO ENTER A JUDGMENT OF ACQUITTAL, OR IN THE ALTERNATIVE THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED, OR IN THE ALTERNATIVE THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR FURTHER HEARING ON THE GOVERNMENT'S ELECTRONIC EAVESDROPPING.

Respectfully submitted,
Albert J. Krieger
Robert Kasanof
Attorneys for Appellant Battaglia

August 1967

APPENDIX A

CERTIFICATE OF COMPLIANCE WITH RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert Kasanof

APPENDIX B

INDEX TO EXHIBITS

Note: We index the exhibits in accordance with the transcripts furnished to us. We first index the exhibits admitted at the trial on the merits, the record of which has been referred to in the brief as "R.T.". Government's Exhibits 1 through 18 are admitted under, and relate to, the stipulation which appears in the clerk's transcript, pages 83-89.

Exhibits Admitted At Trial

GOVERNMENT'S EXHIBITS	IDENT'D	REC'd
20 Letter		92
21 Agreement		107
22 Logs	29	
23 F.B.I. Report	38	
24 Grand Jury Testimony	53	
30 Report (Defendant's H)	161	
31 Resume	177	
32 Grand Jury Testimony	220	
33, 34, 35 & 36 (In Re Bierschbach)	235	
37 Interview Report (Defendant's I)	272	

38	Interview Report	272
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DEFENDANT'S EXHIBITS		IDENT'D	REC'D	WITH-DRAWN
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G	Check	154	155	
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I	(Government's Exhibit 37)		290	292

Exhibits Admitted at Hearing

Note: The following exhibits were admitted at the hearing, the transcript of which has been referred to in the brief as "R.H.".

EXHIBITS	MARKED FOR IDENTIFICATION	MARKED INTO EVIDENCE
Government's #18	114	123
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APPENDIX C

UNITED STATES CONSTITUTIONAL PROVISIONS

Amendment III

No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a

witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.